

BURGER, MEYER & D'ANGELO, LLP

Bron E. D'Angelo, Esq. (SBN 246819)
Anna L. Cornetta, Esq. (SBN 351761)
BURGER, MEYER & D'ANGELO, LLP
999 Corporate Drive, Suite 225
Ladera Ranch, CA 92694
Telephone: (949) 427-1888
Facsimile: (949) 427-1889
Email: bdangelo@burgermeyer.com
acornetta@burgermeyer.com

Attorneys for Defendant
WALMART INC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRADLEY BORGES, an individual,
Plaintiff,

vs.

WALMART INC., a corporation; DOE 1, an
individual, and DOES 2 through 50, inclusive,
Defendants.

Case No.: 2:25-cv-00690-MCS-MAA
Judge: Mark C. Scarsi

**DEFENDANT WALMART INC.'S
RENEWED MOTION TO DISMISS
UNDER F.R.C.P RULE 12(b)(5) AND
12(b)(6)**

Hearing Date: March 31, 2025
Time: 9:00 a.m.

Action Filed: June 28, 2024
Trial Date: None Set

TO THE COURT AND ALL PARTIES OF RECORD:

PLEASE TAKE NOTICE that on March 31, 2025, at 9:00 a.m., or as soon thereafter as the matter may be heard in in front of Honorable Mark C. Scarsi of the above-entitled Court, located at Roybal Federal Building and United States Courthouse, 255 E. Temple St., Los Angeles, CA, 90012, Courtroom 880, 8th Floor, Defendant, WALMART,INC. (the "Defendant"), by and through its attorneys of record, hereby files this Motion to Dismiss for failure to state a claim upon which relief can be granted and insufficient service of process.

1 This Motion is made and based upon this notice, the accompanying
2 Memorandum of Points and Authorities attached hereto, the papers and pleadings on
3 file herein, and any oral argument that may be presented to the Court at the time of
4 the hearing.

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6 Dated: February 19, 2025

BURGER, MEYER & D'ANGELO, LLP

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Bron E. D'Angelo, Esq.
Anna L. Cornetta, Esq.
Attorneys for Defendant
WALMART INC

BURGER, MEYER & D'ANGELO, LLP

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	FACTUAL AND PROCEDURAL BACKGROUND.....	1
III.	LEGAL STANDARD	2
	a. Federal Rule of Civil Procedure 12(b)(5) – Insufficient Service of Process	2
	b. Federal Rule of Civil Procedure 12(b)(6) – Failure to State a Claim	3
IV.	LEGAL ARGUMENT	3
	a. Plaintiff’s Entire Action Must be Dismissed Under FRCP Rule 12(b)(5).....	3
	b. Plaintiff’s Second Cause of Action Must be Dismissed Under FRCP Rule 12(b)(6).....	4
	i. Plaintiff’s ADA Violation Claim Must Be Dismissed	4
	1. <u>Lack of Allegation of Violation of Accessibility</u> Standards	4
	a. <i>Temporary and Movable Obstruction</i>	5
	ii. Plaintiff’s Unruh Act and California Disabled Persons Act Violation Claim Must Be Dismissed	6
V.	CONCLUSION	6

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Ashcroft v. Iqbal</i>	
556 U.S. 662 (2009).....	3
<i>Bell Atl. Corp. v. Twombly</i>	
550 U.S. 544 (2007).....	3
<i>Chapman v. Pier 1 Imports (U.S.) Inc.</i>	
779 F.3d 1001 (9th Cir. 2015)	5
<i>Efaw v. Williams</i>	
473 F.3d 1038 (9th Cir. 2007).....	3
<i>Molski v. M.J. Cable, Inc.</i>	
481 F.3d 724, 730 (9th Cir. 2007)	4
<i>Ranieri v. Garland</i>	
664 F.Supp. 3d 554	3
<u>Rules</u>	
28 C.F.R. Section 36.211(b)	5,6
75 Fed.Reg. 56,236, 56,270 (Sept. 15, 2010)	5
California Rules of Court Rule 3.110(b)	2
Fed. R. Civ. P. 4(m).....	2,3
Fed. R. Civ. P. 12(b)(5).....	1,2,3,4,6
Fed. R. Civ. P. 12(b)(6).....	1,2,3,4,5
Fed. R. Civ. P. 81(c)(1).....	2
<u>Statutes</u>	
28 U.S.C. § 1448.....	2
42 U.S.C. § (a)(1)	4
42 U.S.C. § 12183(a)(2)	4
42 U.S.C. § 12182(b)(2)(A)(iv).....	4
Cal. Civ. Code § 51(b)	6

1	Cal. Civ. Code § 51(f).....	6
2	Cal. Civ. Code § 54(c)	6
3	<u>Secondary Sources</u>	
4	ADA Title III Technical Assistance Manual § III–3.7000	5

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff alleges violations of the Americans with Disabilities Act (“ADA”), Unruh Civil Rights Act (“Unruh Act”), and California Disabled Persons Act but fails to state a claim upon which relief can be granted as to this cause of action. The Complaint is deficient because it lacks the necessary factual allegations to establish a violation of the ADA and, consequently, the Unruh Act and California Disabled Persons Act. Thus, Plaintiff’s second cause of action should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Further, Plaintiff’s Complaint should be dismissed in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(5) for insufficient service of process.

II. FACTUAL AND PROCEDURAL BACKGROUND

On June 28, 2024, Plaintiff filed his Complaint in this case in the Los Angeles County Superior Court. Despite filing the Complaint, Plaintiff did not serve the Complaint and Summons on Defendant until December 27, 2024, far exceeding the time limits for service set forth in the both the California Rules of Court and the Federal Rules of Civil Procedure. On January 27, 2024, Defendant properly removed this action to the United States District Court for the Central District of California under diversity jurisdiction.

The Complaint alleges a first cause of action for negligence/premises liability, a second cause of action for damages (violation of ADA/Unruh/DPA) and a third cause of action for damages (declaratory relief- Cod Civ. Proc. §1060). The Complaint alleges that Plaintiff, a person with a disability, was denied access to a pathway on Defendant’s premises due to an obstruction caused by Defendant’s employee. Specifically, the Complaint states that Defendant’s employee, while operating a merchandise-carrying cart, collided with Plaintiff and caused an injury, thereby obstructing Plaintiff’s access to the pathway. Plaintiff further alleges that

1 Defendant's actions violated the ADA by denying Plaintiff access to the pathway on
2 the basis of his disability, which Plaintiff alleges caused harm.

3 The Complaint fails to state a valid claim under the ADA. Plaintiff does not
4 adequately allege the essential elements of an ADA claim, including specific acts of
5 discrimination by Defendant.

6 **III. LEGAL STANDARD**

7 **a. Federal Rule of Civil Procedure 12(b)(5) – Insufficient Service of**
8 **Process**

9 Under Rule 12(b)(5), a defendant may move to dismiss a claim for insufficient
10 service of process. Fed. R. Civ. P. 12(b)(5). While the Complaint was originally filed
11 in the Los Angeles Superior Court, Plaintiff's service of process is considered
12 insufficient under both the California Rules of Court Rule 3.110(b) ("the complaint
13 must be served on all named defendants and proofs of service on those defendants
14 must be filed with the court within 60 days after the filing of the complaint") and the
15 Federal Rules of Civil Procedure Rule 4(m), ("if a defendant is not served within 90
16 days after the complaint is filed, the court – on motion or on its own after notice to
17 the plaintiff—must dismiss the action without prejudice against that defendant or
18 order that service be made within a specified time").

19 Once an action is removed to federal court, the Federal Rules of Civil
20 Procedure govern procedural matters. Fed. R. Civ. P. 81(c)(1). Therefore, state
21 procedural rules do not apply post-removal, and Rule 4(m) controls. "In all cases
22 removed from any State court to any district court of the United States in which
23 ...process served proves to be defective, such process or service may be completed
24 or new process issued in the same manner as in cases originally filed in such district
25 court." 28 U.S.C. § 1448.

26 Here, Plaintiff's service was untimely under Rule 4(m). Plaintiff did not serve
27 his Summons and Complaint on Defendant for 182 days after filing the Complaint.
28 To date, Plaintiff has not presented any justification for the extensive delay.

1 Therefore, Defendant requests the Complaint be dismissed on the grounds of
2 insufficient service of process.

3 **b. Federal Rule of Civil Procedure 12(b)(6) – Failure to State a Claim**

4 Under Rule 12(b)(6), a defendant may move for failure to state a claim upon
5 which relief can be granted. A plaintiff must state “enough facts to state a claim to
6 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
7 (2007). A claim has “facial plausibility” if the plaintiff pleads facts that “allow[] the
8 court to draw the reasonable inference that the defendant is liable for the misconduct
9 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

10 A pleading must contain allegations that have “factual content that allows the
11 court to draw the reasonable inference that the defendant is liable for the misconduct
12 alleged.” *Id.* Courts “are not bound to accept as true a legal conclusion couched as a
13 factual allegation.” *Id.* at 678. (internal quotation marks omitted) (quoting *Twombly*,
14 550 U.S. at 555). If factual allegations are properly pleaded, a court must then
15 “determine whether [the allegations] plausibly give rise to an entitlement to
16 relief.” *Id.* at 679. There is no plausibility “where the well-pleaded facts do not
17 permit the court to infer more than the mere possibility of misconduct.” *Id.*

18 **IV. LEGAL ARGUMENT**

19 **a. Plaintiff’s Entire Action Must Be Dismissed Under FRCP Rule**
20 **12(b)(5)**

21 Federal courts routinely dismiss actions where plaintiffs fail to effectuate
22 timely service under Rule 4(m). See *Raniere v. Garland*, 664 F.Supp. 3d 554
23 (dismissing under Rule 12(b)(5) where more than 200 days had passed since filing
24 and the court found no good cause for the delay, dismissing all defendants without
25 prejudice). Under Federal Rule of Civil Procedure 4(m), a court may extend the
26 service deadline only if good cause is shown. Good cause for an extension may exist
27 if plaintiff made diligent but unsuccessful attempts at service. See *Efaw v. Williams*,
28

1 473 F.3d 1038 (9th Cir. 2007) (the Ninth Circuit held that good cause requires due
2 diligence by Plaintiff and dismissed the case where no diligence was shown).

3 Here, Plaintiff has no justification for the 182-day delay in service. Since no
4 good cause exists, the Court should dismiss under Rule 12(b)(5).

5 **b. Plaintiff's Second Cause of Action Must be Dismissed Under**
6 **FRCP Rule 12(b)(6)**

7 **i. Plaintiff's ADA Violation Claim Must Be Dismissed**

8 "To prevail on a Title III discrimination claim, the plaintiff must show that (1)
9 she is disabled within the meaning of the ADA; (2) the defendant is a private entity
10 that owns, leases, or operates a place of public accommodation; and (3) the plaintiff
11 was denied public accommodations by the defendant because of her disability."
12 *Molski v. M.J. Cable, Inc.* 481 F.3d 724, 730 (9th Cir. 2007). Here, Defendant does
13 not dispute that the Plaintiff is disabled or that Defendant operates a place of public
14 accommodation. This motion to dismiss centers on whether Plaintiff has plausibly
15 alleged that Defendant discriminated against him on account of his disability.

16 Here, Plaintiff failed to state a cause of action for which relief can be granted in
17 accordance with the *Federal Rules of Civil Procedure* 12(b)(6) as Plaintiff failed to
18 plead facts sufficient to satisfy the third element of the alleged ADA violation.

19 **1. Lack of Allegation of Violation of Accessibility Standards**

20 The Complaint alleges that Defendant failed to abide by the applicable
21 requirements and caused the walkway, pathway, or passageway to be obstructed,
22 impeding, blocking, and hindering Plaintiff's safe accessibility while utilizing an
23 electric wheelchair. As stated in the Complaint, "'discrimination'" includes 'a failure
24 to remove architectural barriers... that are structural in nature, in existing facilities
25 where such removal is readily achievable...' 42 U.S.C. section 12182(b)(2)(A)(iv) and
26 12183(a)(2). 'Discrimination' also includes a failure to design and construct or to make
27 alterations to the facility that render it "readily accessible to and usable by individuals
28 with disabilities.' 42 U.S.C. section (a)(1)." Complaint at ¶32. However, the alleged

1 obstruction does not meet the necessary criteria to constitute a violation under the
2 ADA, as an employee pushing a merchandise re-stocking cart does not constitute an
3 architectural barrier or a failure to provide accessible facilities as defined under these
4 laws.

5 *a. Temporary and Movable Obstruction*

6 The alleged incident described involves a temporary and movable obstruction
7 caused by a re-stocking cart, which does not amount to a violation of ADA standards.
8 According to 28 C.F.R. Section 36.211(b), “isolated or temporary interruptions in
9 service or access due to maintenance or repairs” are not violations.

10 Case law supports the conclusion that the use of a re-stocking cart is temporary
11 or isolated. In *Chapman v. Pier 1 Imports (U.S.) Inc.*, the Ninth Circuit relied partly
12 on the Department of Justice’s Technical Assistance Manual (“Manual”) to analyze
13 Section 36.211(b), which permits isolated or temporary interruptions in accessibility.
14 *Chapman v. Pier 1 Imports (U.S.) Inc.*, 779 F.3d 1001 (9th Cir. 2015). The Manual
15 clarifies that “[a]n isolated instance of the placement of an object on an accessible
16 route would not be a violation, if the object is promptly removed.” *Id.* at 1006 (quoting
17 Manual § III–3.7000). DOJ commentaries similarly note that “a temporary interruption
18 that blocks an accessible route, **such as restocking of shelves**,” is permitted by §
19 36.211(b). *Id.* at 1007 (quoting 75 Fed.Reg. 56,236, 56,270 (Sept. 15, 2010))
20 (emphasis added).

21 Unlike *Chapman*, where the court found a violation due to Pier 1’s repeated
22 failure to maintain accessible routes over multiple visits spanning multiple years, the
23 present case involves a single, temporary obstruction – a moving re-stocking cart –
24 alleged to have blocked access on only one occasion.

25 As described in Plaintiff’s Complaint, the temporary obstruction was described
26 to be a re-stocking cart that was actively being moved. Because § 36.211(b) expressly
27 excuses isolated or temporary interruptions, this allegation amounts to neither a
28

1 violation of ADA standards nor the state equivalent. Therefore, Plaintiff has failed to
2 state a claim upon which relief can be granted.

3 **ii. Plaintiff's Unruh Act and California Disabled Persons Act**
4 **Violation Claim Must Be Dismissed**

5 The Unruh Act states that "all persons [in California] are free and equal, and
6 no matter what their sex, race, color, religion, ancestry, national origin, disability,
7 medical condition, marital status, or sexual orientation are entitled to the full and
8 equal accommodations, advantages, facilities, privileges, or services in all business
9 establishments of every kind whatsoever." Cal. Civ. Code § 51(b). Moreover,
10 a "violation of the right of any individual under the [ADA] shall also constitute a
11 violation of this section." *Id.* at subd. (f) (citation and footnote omitted).

12 A violation of the ADA also constitutes a violation of the Unruh Act and the
13 California Disabled Persons Act. *Id.*; 54(c). Since Plaintiff failed to state a plausible
14 claim for relief under the ADA, both the alleged violations under the Unruh Act and
15 California Disabled Persons Act must be dismissed.

16 **V. CONCLUSION**

17 For the foregoing reasons, Plaintiff has failed to state a claim upon which
18 relief can be granted as to his second cause of action and dismissal is warranted
19 under Rule 12(b)(6). Plaintiff has not sufficiently pleaded that the alleged obstruction
20 was a violation of the ADA under 28 C.F.R. § 36.211(b). Because Plaintiff's
21 allegations concern a singular, momentary obstruction rather than a systemic failure
22 to maintain accessibility, Plaintiff has not pleaded a plausible claim for relief.

23 Additionally, dismissal is warranted under Rule 12(b)(5) because Plaintiff
24 failed to effectuate proper service. Plaintiff's failure to timely serve Defendant
25 warrants dismissal of the Complaint in its entirety.

26 Accordingly, Defendant respectfully requests that the Court grant this motion
27 and dismiss Plaintiff's Complaint.

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3 Dated: February 19, 2025

BURGER, MEYER & D'ANGELO, LLP

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7 Bron E. D'Angelo, Esq.
8 Anna L. Cornetta, Esq.
9 Attorneys for Defendant
10 WALMART INC
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BURGER, MEYER & D'ANGELO, LLP

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 999 Corporate Drive, Suite 225, Ladera Ranch, California.

On February 19, 2025, I served the within document(s) described as **DEFENDANT WALMART INC.'S RENEWED MOTION TO DISMISS UNDER F.R.C.P RULE 12(b)(5) AND 12(b)(6)** on the interested parties in this action as stated on the attached mailing list.

Delavar Omidfar, SBN 317026 MAKKABI LAW GROUP, APC 9454 Wilshire Boulevard, Suite 900 Beverly Hills, California 90212	Attorneys for Plaintiff Bradley Borges T: (310) 887-8000 F: (310) 887-8001 E: info@makkabilaw.com domifar@makkabilaw.com 14@makkabilaw.com
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[] **BY E-MAIL:** I caused a copy of the document(s) to be sent from e-mail address nsebreros@burgermeyer.com to the persons at the e-mail addresses listed in the Service List. The document(s) were transmitted, and I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[X] **BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 3, 2025, at Ladera Ranch, California.



Nicole Sebreros